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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1941

No. 713

JOE TENNER,
Petitioner,

vs.

CHARLES W. DULLEA, Chief of Police of the City and County of San Francisco,
Respondent.

REPLY OF PETITIONER TO BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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REPLY OF PETITIONER TO BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Pursuant to the provisions of Subdivision (a) of Section 4 of Rule 38 of this Honorable Court, we respectfully ask consideration of this reply to the brief filed by the Attorneys-General of the States of California and Washington in opposition to the petition for a writ of certiorari to the Superior Court of

the State of California in and for the City and County of San Francisco to review a final judgment and decree of that Court denying a writ of *habeas corpus,* to petitioner, who was admittedly restrained of his liberty by respondent solely by virtue of a statute of the State of California which purports to create a compact with the State of Washington by the terms of which officers from either state are authorized to enter the other, and take any person on parole, without any extradition proceedings or any judicial hearing, without any warrant or process, and without any right of appeal to the Courts of the state in which such person is domiciled.

I.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL.

In our petition we pointed out what should be apparent at first blush,—that this statute or compact, or by whatsoever name it may be called, is a violation of the provisions of Article II, Section 2, Clause 2, of the Constitution of the United States and the Act of Congress of 1793 (U. S. C. A., Title 18, Sec. 662), because it attempts to dispense altogether with the requirements of extradition proceedings as they have existed for a century and a half. Counsel for respondent concede (page 14 of Respondent's Brief) the correctness of the statement contained in the petition that interstate extradition or rendition is not a matter of comity but of strict law.

People ex rel. Corkran v. Hyatt, 172 N. Y. 176, 64 N. E. 825, affirmed in

Hyatt v. New York, 188 U. S. 691, 47 Law. Ed. 657.

Indeed, it would have been futile to have contended otherwise, for state and federal Courts have held signally and emphatically that the executive authority of a state has no power to render up an alleged fugitive to another state for the mere asking, and that one domiciled, or even found in one state cannot be extradited unless the provisions of the Act of 1793 are complied with. To authorize extradition it must appear that the accused is substantially charged with a crime in the demanding state by an indictment of a grand jury or an affidavit laid before a magistrate charging him with a crime against its laws, that he was physically within the demanding state at the time the crime was committed,—for one cannot be a fugitive from a place where he has never been,—and that he has fled from justice within the meaning of the Constitution, which means that after the commission of the crime he of his own volition departed from the demanding state, for he does not flee if he is taken thence by force. (See *In re Whittington,* 34 Cal. App. 344, 167 Pac. 404.)

The presence of these elements and compliance with this procedure have long been recognized as absolutely essential:

> "The governor of this state was not authorized to issue his warrant for the arrest of the petitioner, unless it was shown to him that the petitioner is substantially charged with a crime in the demanding state * * * And whether the alleged fugitive is so charged with a crime is a

> question of law which is always open, upon the face of the papers, to judicial inquiry, on an application for discharge under a writ of *habeas corpus.*"
>
> *Ex parte Spears,* 88 Cal. 640, 26 Pac. 608.

In that decision, as also in the very learned opinion of the Oklahoma Court of Criminal Appeals in *Ex parte Owen,* 10 Okl. Cr. 284, 136 Pac. 137, it was held that an affidavit, not made on oath certain, but merely on information and belief, was not a compliance with the act of Congress. In the latter case it was likewise held that the affidavit could not be sworn to before a notary public, who was not a magistrate,—and in each case the petitioner was discharged on *habeas corpus.*

Yet what the Courts have always held that the state may *not* do, it is now contended by respondent that the state *may* do, nay, more, that it may dispense altogether with extradition requirements and procedure because of the act of Congress of June 6, 1934. (U. S. C. A. Title 18, Section 420.) This is no overstatement, because if the state may waive extradition procedure in the case of an alleged parole violator who came within its borders (as Tenner did) with the permission of the sending state, it may likewise do so in the case of all persons charged with crime in other jurisdictions. It may even surrender those merely *suspected* of crime, if respondent is correct.

The answer is that the act of Congress does not *say* that the state may dispense with extradition requirements in *any* case. It certainly does not say so specifically. Is this Court to hold that it says so by *implica-*

tion? Is one to be deprived of liberty by implication? Will this Court pronounce the justly reprobated doctrine of repeal by implication? Or will it amend the Constitution by implication? We think not.

But in any event, is it not absurd to say, as the learned Attorneys-General have said, that these are not *substantial* federal questions?

II.

THE CLAIM THAT PETITIONER HAS NOT EXHAUSTED HIS REMEDY IN THE STATE COURTS IS WITHOUT MERIT.

Relying upon *Mooney v. Holohan*, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406, respondent's counsel raise the contention that petitioner has failed to exhaust his remedy in the state Courts, and, not having done so, will not be heard here for the present. In that case the petitioner, raising matters discovered since his trial and conviction, petitioned this Court in an original proceeding in habeas corpus, on the ground that the state had procured his conviction by perjured testimony connived at by the District Attorney. This Court, as then constituted, held that he should first seek redress in the state Courts. The case here is patently distinguishable from *Mooney's* case (1) because here the sole question presented is indisputably one arising under the Constitution and laws of the United States, the challenged statute of the state being assailed as invalid under the organic and statutory federal law; and (2) because in the instant case, a final decree has been passed by the state Court

from which there is no appeal. That in such case the party aggrieved may present his complaint to this Court is well settled, because, as said in *Kentucky v. Powers,* 201 U. S. 1, 26 S. Ct. 387, 50 L. Ed. 633:

> "This must be so, else it would be in the power of a state so to regulate the jurisdiction of its courts as to prevent this court from protecting rights secured by the Constitution and improperly denied in a subordinate state court, though specially set up and claimed."

However, the contention is decisively answered in the opinion handed down on the 24th of last month by this Court in *Edwards v. California* (No. 17, October Term, 1941), in which this Court entertained a direct appeal from the Superior Court of California, and held unconstitutional a state statute. There was there, as here, no appeal from the judgment of the Superior Court, but the appellant might have applied to the District Court of Appeal or to the Supreme Court for a writ of *habeas corpus.* Earlier cases in which this Court entertained writs of error to subordinate state tribunals are cited in *Kentucky v. Powers,* supra, and see cases cited in U. S. C. A., Title 28, Section 344, note 32. Moreover, the rule laid down in *Mooney's* case is based merely on considerations of "orderly procedure", and a mere rule of practice should never be permitted to override a constitutional right. (See *Agnello v. United States,* 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145, 51 A. L. R. 409.)

III.

THE FEDERAL QUESTION WAS PROPERLY RAISED.

The Attorneys-General do not point out wherein the federal questions were insufficiently raised. They are specifically set up in the exceptions to the return to the writ of *habeas corpus* where it was clearly called to the attention of the state Court that petitioner was held in violation of Article II, Section 2, Clause 2 of the Constitution and of the Act of Congress of 1793 because no extradition proceedings in accordance with that act were pending against him. The certificate of the judge of the state Court removes any possible ambiguity, and it is "elementary that such a certificate may serve to elucidate the determination whether a federal question exists".

Rector v. City Deposit Co., 200 U. S. 405, 26 S. Ct. 289, 50 L. Ed. 527.

Dated, San Francisco, California,
December 3, 1941.

Respectfully submitted,
WILLIAM KLEIN,
WILLIAM F. HERRON,
Attorneys for Petitioner.

Due service and receipt of a copy of the within is hereby admitted

this.....*day of December, 1941.*

.....

Attorney General of the State of California,

.....

Deputy Attorney General of the State of California,

.....

Attorney General of the State of Washington,

.....

Special Assistant to the Attorney General of the State of Washington,

Attorneys for Respondent.